

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1927.

No. 4612. **426**

OSCAR WILKINSON, APPELLANT,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIA-
FERRO, AND WILLIAM B. LADUE, COMMIS-
SIONERS OF THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 9, 1927.

PRINTED AUGUST 1, 1927.

Court of Appeals of the District of Columbia

APRIL TERM, 1927.

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OSCAR WILKINSON, APPELLANT,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIAFERRO, AND WILLIAM B. LADUE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia

No. 4612.

OSCAR WILKINSON, Appellant,

vs.

PROCTOR L. DOUGHERTY et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 42794.

OSCAR WILKINSON, Plaintiff,

vs.

CUNO H. RUDOLPH, JAMES F. OYSTER, and J. FRANKLIN BELL,
Commissioners of the District of Columbia, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill of Complaint

Filed June 27, 1924.

In the Supreme Court of the District of Columbia.

In Equity.

No. 42794.

OSCAR WILKINSON, Plaintiff,

VS.

CUNO H. RUDOLPH, JAMES F. OYSTER, and J. FRANKLIN BELL,
Commissioners of the District of Columbia, Defendants.

To the Supreme Court of the District of Columbia:

The Plaintiff states as follows:

1. The Plaintiff, Oscar Wilkinson, is a citizen of the United States and a resident of the District of Columbia, and brings this suit in his own right.

2. The Defendants, Cuno H. Rudolph, James F. Oyster, and J. Franklin Bell are citizens of the United States and residents of the District of Columbia and are sued as Commissioners of the District of Columbia.

3. By Act of March 2, 1893 (27 Stat., 532) the District Commissioners were directed to prepare a plan for extension of a Permanent System of Highways over the entire District outside of the Cities of Washington and Georgetown.

4. The plan was to be prepared in sections, each section covering a certain portion of the District. A map showing the plan of each section was required to be prepared by the Commissioners and submitted to a Highway Commission created by said Act consisting of the Secretary of War, the Secretary of the Interior and the Chief of Engineers. When such plan was approved by the Highway Commission it should be recorded in the Office of the District Surveyor.

2 All future subdivisions of land were required to be in conformity to such maps. Such maps were to show the location of all streets.

5. The foregoing provisions were all contained in sections 1, 2, 3, 4 and 5 of said Act. The remaining sections of said Act, Sections 6 to 19 inclusive provided among other things that "The Commissioners at any time thereafter, when in their judgment the public convenience shall require," might proceed by condemnation proceedings to condemn and acquire the land for the opening for extension of any highway laid down upon such map and those sections provided the exact method of acquiring such land by condemnation.

6. By Act of June 28, 1898 (30 Stat., 519) Congress entirely repealed all the sections of the above Act of March 2, 1893 from 6 to 19 inclusive and said Act of June 28, 1898 further provided that the map shown as "Section 1" filed in the office of the District Surveyor on Aug. 31, 1895 is hereby annulled and the Commissioners are directed to withdraw the same from the office of the Surveyor and within 90 days from the passage of this Act, to prepare an amended plan for that part of "Section 1" outside of existing subdivisions, and said amended plan when recorded shall take the place and stand for any previous plan of "Section 1", and that the "plat of such readjustment" should be forwarded to the Highway Commission and when approved by said Commission or a majority thereof the change should be recorded in the Surveyor's office and become a part of the permanent system of highways and take the place of any part inconsistent therewith.

7. Said Act further provided that no map should be submitted for approval to the Highway Commission until the owners of the land within the territory embraced within such map shall have been given an opportunity to be heard by the Commissioners after public notice to that effect for 14 consecutive days excluding Sundays.

8. By Act of Feb. 5, 1907 (now embodied as subchapter 1 of Chapter 15 of the Code of Law for the District of Columbia as Sections 491-A to 491-G inclusive) Congress provided:

"Whenever land is needed for the opening, extension, widening or straightening of any street, avenue, road, or highway in the District of Columbia, authorized by Congress, the Commissioners of the District of Columbia may institute in the Supreme Court of the District of Columbia,

sitting as a District Court, by petition, a proceeding in rem for the condemnation of the land needed." And sections 491-B to 491-G inclusive specify the routine of proceedings, selection of jury, assessment of benefits, etc., in such condemnation proceedings. Section 491-D was amended by the Act of April 19, 1920, in certain particulars not pertinent to this case.

9. On Aug. 30, 1895 Section 1 of the original highway plan prepared under the above Act of 1893 was adopted and duly recorded in the Surveyor's Office on Aug. 31 1895.

Said Section 1 included the plan of extension of the street subsequently named Crittenden Street from 16th street westward to 17th Street N. W., and all other land in that immediate vicinity.

10. The amended plan for said First Section, prepared as directed by the above act of 1898, was approved by the Highway Commission on Feb. 11, 1899 and was duly recorded, by order of the District Commissioners in the Surveyor's office at 2:55 P. M. of the same day, Feb. 11, 1899.

By this amended plan there was no change whatever from the original location of the street afterward called Crittenden Street extending from 16th Street to 17th Street N. W.

11. By Act approved March 4, 1913 (37 Stat. 949) it is provided:

4 "That the Commissioners of the District of Columbia are hereby authorized, whenever in their judgment the public interests require it, to prepare a new highway plan for any portion of the District of Columbia, and submit the same for approval, after public hearing, to the highway commission, created by Act of Congress approved March second, eighteen hundred and ninety-three, entitled, "An Act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities"; that such highway plans shall be prepared under the provisions of said Act of Congress and an amendment thereto approved June twenty-eighth, eighteen hundred and ninety-eight, and that upon approval and recording of any such new highway plan it shall take the place of and stand for any previous plan for the portion of the District of Columbia affected.

That the Commissioners of the District of Columbia are hereby *authorized to open, extend, or widen any street,*

avenue, road, or highway *to conform with the plan* of the permanent system of highways in that portion of the District of Columbia outside of the cities of Washington and Georgetown, *adopted under the Act of Congress approved March second, eighteen hundred and ninety-three, as amended by the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight*, by condemnation under the provisions of sub-chapter one of chapter fifteen of the Code of Law for the District of Columbia: Provided, That the entire amount found to be due and awarded to the jury under such proceedings as damages for and in respect of the land condemned, plus the cost and expenses of said proceedings, shall be assessed by the jury as benefits: And provided further, That the costs and expenses of the condemnation proceedings taken under the provisions hereof, and the amounts awarded as damages for and in respect of the land condemned, shall
5 be paid entirely from the revenues of the District of Columbia, and shall be repaid to said District of Columbia from the assessments for benefits and covered into the Treasury of the United States to the credit of the revenues of the District of Columbia; and such sum as is necessary for said purpose during the fiscal year to end June thirtieth, nineteen hundred and fourteen, is hereby appropriated, payable entirely from the revenues of the District of Columbia.”

12. On March 3, 1922 the Commissioners of the District of Columbia submitted to the Highway Commission a plat by which they recommended a change in the location of Crittenden Street by moving both the south line and the north line of said street from 16th Street to 17th Street N. W., a distance of approximately 42 feet and 1 inch north of the former location of the south line and the north line of Crittenden Street.

Accompanying the map or plat showing the location of Crittenden Street as then established by the existing highway plan and the proposed location of Crittenden Street by which both the south line and the north line of said street are moved to the north a distance of 42 feet and 1 inch, the Commissioners submitted a recommendation and said recommendation was acted upon, as follows:

“Under authority conferred by public Act No. 435, approved March 4, 1913, we, the Commissioners of the Dis-

trict of Columbia, hereby approve the changes in the First Section of the Permanent System of Highways Plan by changing the alignment and eliminating a certain part of Crittenden Street N. W. as shown hereon in hatched lines, and we establish another highway as indicated by heavy dotted lines, and we hereby certify that the changes in the Permanent System of Highways Plan, as shown thereon, are in accordance with the above mentioned act, and that in our judgment the public interest requires the changes shown thereon.”

Respectfully submitted to the Highway Commission for approval.

March 3, 1922.

CUNO H. RUDOLPH,

JAS. F. OYSTER,

F. S. BESSON, *Actg.*

Commissioners of the District of Columbia.

“Approved under authority of the Act mentioned thereon by the Highway Commission at its meeting Aug. 23, 1922.

JOHN W. WEEKS,

Secretary of War.

— — — — —

Secretary of the Interior.

LANSING H. BEACH,

Major General, Chief of Engineers, U. S. A.

“Office of the Commissioners of the District of Columbia,
Washington, D. C.

Sept. 2, 1922.

Ordered: The Surveyor of the District of Columbia will admit this plat to record in his office.

CUNO H. RUDOLPH,

JAS. F. OYSTER,

F. S. BESSON, *Actg.*

Commissioners of the District of Columbia.

Received for Record Sept. 13, 1922, 2-30 P. M. S. O. D. C.

Recorded in Street Extension Book #5, page 26, S. O.

D. C.

7 Map No. W. D. E. D. 11226/248.”

A copy of said plat is filed herewith and made a part hereof, marked “Plaintiff’s Exhibit A.”

13. On Nov. 27, 1922 the Commissioners of the District of Columbia filed a petition in the D. C. Supreme Court sitting as a U. S. District Court, Case No. 1550, praying condemnation of the land for extension of Crittenden Street between 16th and 17th Streets N. W. between the boundaries fixed by the plat recorded Sept. 13, 1922.

On March 8, 1923 testimony was taken in said condemnation proceedings and on June 29, 1923 a verdict was returned by the jury in said condemnation proceedings. On July 30, 1923 the Court ratified and confirmed the verdict of said jury.

14. The Act of Congress aproved Dec. 18, 1908 (35 Stat. 582) (now embodied as Sec. 491 J of the Code of Law for the District of Columbia) provides: "When finally ratified and confirmed by the Court, the several assessments authorized to be levied or made by the jury shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal annual instalments, with interest at the rate of 4% per annum from and after 60 days after the confirmation of the verdict of the jury."

15. Oscar Wilkinson the plaintiff herein, is and was at all times during the years 1922 and 1923 and for some years prior to 1922 the owner of lot No. 18 in Square No. 2653, located and fronting on the west side of 16th Street, having a frontage of 85 feet on 16th Street and a depth of approximately 214 feet to a 30 foot alley, this alley running north and south and approximately parallel to the west line of 16th Street. The south line of said lot No. 18 owned
8 by said Oscar Wilkinson is parallel to the north line of Crittenden Street as said Crittenden Street was projected on the original Highway Plan and will be parallel to the north line of Crittenden Street as attempted to be projected on the amended Highway Plan recorded in the Surveyor's office Sept. 13, 1922; said south line of said lot 18 was about 48 feet north of the north line of Crittenden Street as projected on the original Highway Plan, and is about six feet north of the north line of Crittenden Street as projected on the attempted amendment of the Highway Plan recorded in the Surveyor's Office on Sep. 13, 1922. There is therefore a strip of land six feet in width lying between the north line of Crittenden Street as projected in

the attempted amendment of the Highway Plan as recorded in the Surveyor's office on Sept. 13, 1922 and the south line of said lot 18, extending all the way from 16th Street westward to the east line of the alley which is the west boundary of said lot 18. No part of said lot 18, therefore, upon the line of Crittenden Street as projected on the attempted amendment of the Highway Plan recorded Sept. 13, 1922. Said Oscar Wilkinson does not own said strip of land six feet in width and he has no knowledge who is the owner of said six foot strip.

16. That the verdict of the jury in the condemnation proceedings awarded as damages for the lands taken for the extension of Crittenden Street 16th Street westward within the lines projected on the attempted amendment of the Highway Plan recorded Sept. 13, 1922 and the costs of the proceeding, the total sum of \$24,628.50 and said jury assessed as benefits against said lot 18 owned by Oscar Wilkinson the sum of \$3,300.00. Under the provisions of Sec. 491 J of the Code of the District of Columbia quoted above, said sum of \$3,300. became a lien upon said lot 18 when the Court took action ratifying and confirming the said assessments.

9 17. Said plaintiff had no notice or knowledge of the filing of the condemnation suit and no notice or knowledge of the trial or the verdict of the jury until he was served from the Office of the Collector of Taxes, D. C. with a special assessment dated Aug. 25, 1923 of \$3,300 "as the benefits assessed by the jury for condemnation of extension of Crittenden Street, under Acts of Congress approved March 4, 1913," this notice of assessment, in the form of a tax bill dated Aug. 25, 1923 having been received by him too late to apply to the trial court for amendment of the verdict of the jury and too late to take an appeal of the case to the Court of Appeals.

18. Instead of the very large sum of \$3,300 assessed against Wilkinson as benefits, the proposed extension of Crittenden Street from 16th to 17th Street is of no benefit whatever to said Wilkinson. He has no interest in any beneficial way in having said street opened from 16th Street westward. On the contrary the opening of said street in various respects would be a damage and injury to his property. The plaintiff, at the time the evidence was taken in

this case, of which he had no notice whatever, had under construction a house on his said 85 foot lot. A vacant space of about 15 feet was left between the south wall of his house and the south line of his lot No. 18. A vacant space of about 15 feet was also left between the north wall of his house and the north line of his lot No. 18. He had access to any garage he might desire to build in the rear of his house and had access to his house for service of fuel, ashes, garbage, etc., either from the 30 foot alley abutting the rear of his lot, or by a roadway from 16th Street running along either the south end or the north end of his house. As stated, no part of his lot abutted upon Crittenden Street as proposed to be extended. The most prominent effect upon his property that must result from

10 the proposed extension of Crittenden Street is that such extension will destroy valuable forest trees now standing within the line of Crittenden Street as proposed to be extended westward, which trees were of real value as enhancing the view from all the windows of his house from the west and south sides. By the proposed extension of Crittenden Street, his house will hereafter look out upon a space 90 feet wide from which all trees are removed and this wide space of macadam or asphalt paving, lying southwest from his house will necessarily bring clouds of dust, to cover his property and house, the prevailing winds being from the southwest. This alone will be a material and important damage to his property. He is unable to conceive any particular in which the opening of this street as proposed can be of any benefit to him. The law requires that the jury in assessing benefits must consider only an actual immediate enhancement of the value of the property against which any such assessment is made. It is submitted that there is not only not a benefit of \$3,300, but there is not a benefit of one dollar to the value of his property and on the other hand there is an actual damage to his property by the proposed extension of this street.

19. The land attempted to be acquired by condemnation in this condemnation proceeding is not land required to open, extend or widen any street, conforming with the *plan* of the Permanent System of Highways *adopted under the*

Act of March 3, 1893 as amended by the Act approved June 28, 1898.

This being true there is no law authorizing the acquisition of this land attempted to be condemned.

Section 7 of the Act of March 2, 1893 (27 Stat. 532) authorized the Commissioners, when in their judgment the public convenience shall require the opening of any highway laid down upon a map of the Highway Plan duly adopted and recorded, to acquire the necessary land
11 for opening the same by condemnation.

Said Section 7 of said Act of 1893 was specifically repealed by the Act of June 28, 1898 (30 Stat. 519). After said repeal by the Act of 1898, there was no law in existence authorizing the Commissioners to condemn any land for extension of a street until enactment of the Act of March 4, 1913, (37 Stat. 950), except special acts relating to particular streets.

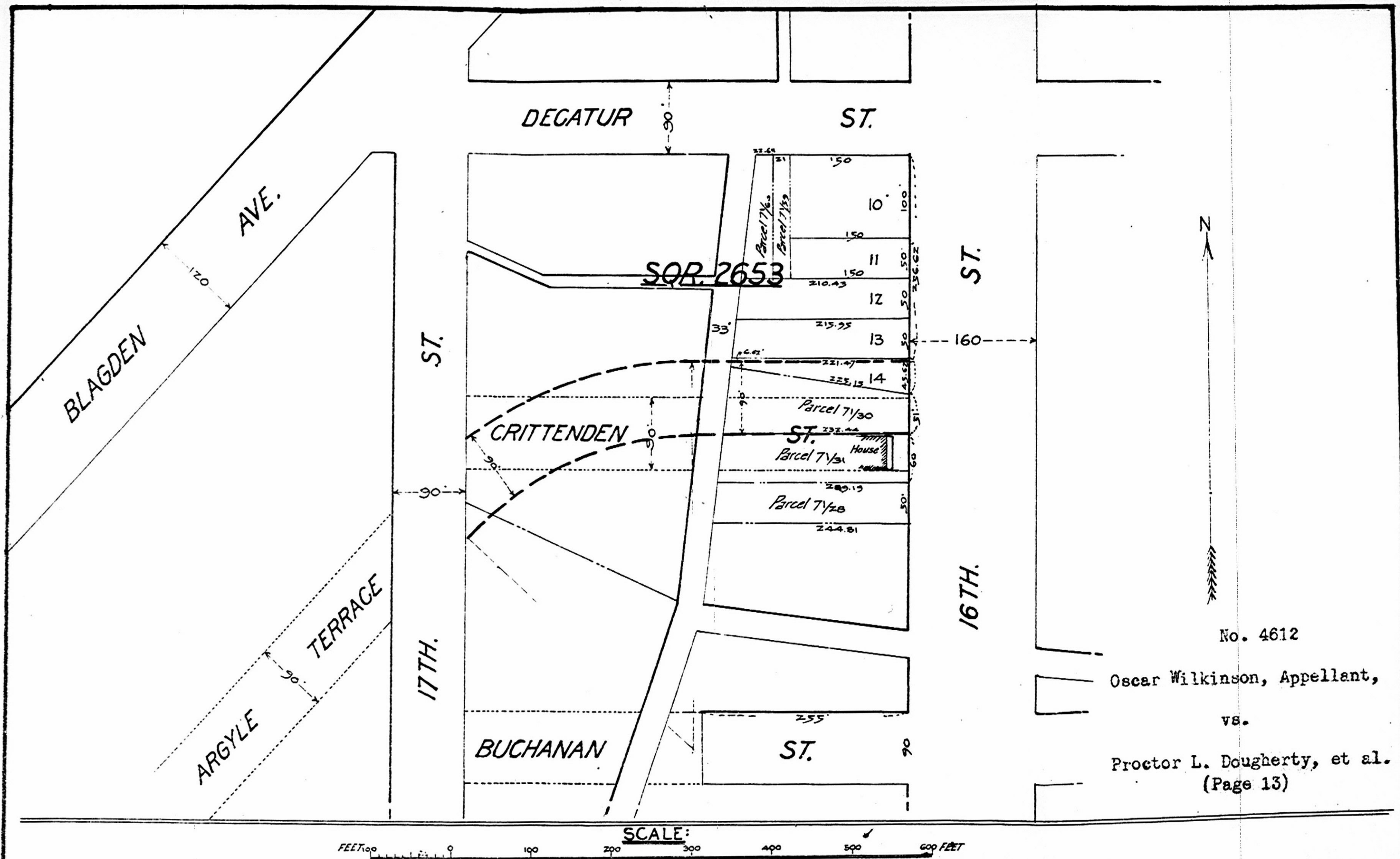
When the Act of 1913 was passed, that act authorized the Commissioners to acquire by condemnation the land necessary to open, extend or widen any street "to conform with the plan of the permanent system of Highways in that portion of the District of Columbia outside of the Cities of Washington or Georgetown adopted under the Act of Congress of March 2, 1893 as amended by the Act of Congress approved June 28, 1898."

This Act does not provide for acquiring by condemnation any land to extend a street projected under any new Highway Plan authorized by said Act of March 4, 1913.

20. There is no other law in existence authorizing condemnation of land for streets in accordance with any new highway plan adopted under the Act of 1913, and there is no law in existence authorizing the condemnation of the land attempted to be condemned in case No. 1550 for extension of Crittenden Street along the changed lines. The Commissioners, therefore, acted without authority, and the Court therefore was without jurisdiction in this case and the assessment of \$3,300 for benefits attempted to be made against Oscar Wilkinson upon lot 18 square 2653 is null and void and said assessment should be cancelled.

The premises considered, Plaintiff prays:

1. That due process be issued requiring the Defendants to appear and answer the exigencies of this bill.



No. 4612

Oscar Wilkinson, Appellant,

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Proctor L. Dougherty, et al.
(Page 13)

permanent system of highways plan by changing the alignment and eliminating a certain part of Clarendon Street, northwest, as shown hereon in hatched lines, and we establish an other highway as indicated by heavy dotted lines; and we hereby certify that the changes in the permanent system of highways plan, as shown hereon, are in accordance with the above mentioned act. and that in our judgment the public interest requires the changes shown hereon.
Respectfully submitted to the highway Commission for approval.

Mar. 2, 1922.

James H. Beahm
J. H. Beahm
T. S. Besson Acty
Commissioners of the District of Columbia.

APPROVED UNDER AUTHORITY OF THE ACT MENTIONED HEREON
BY THE HIGHWAY COMMISSION AT ITS MEETING AUG. 23, 1922.

John D. Weeks
Secretary of War

Secretary of the Interior

Frederic H. Beach
Major General, Chief of Engineers, U.S.A.

Ordered:

Office of the Commissioners of the District of Columbia
Washington, D. C. Sept. 2nd 1922.
The Surveyor of the District of Columbia will admit this plat to record in his Office.

James H. Beahm
J. H. Beahm
T. S. Besson Acty
Commissioners of the District of Columbia.

LEGEND

Public highways indicated by full lines, thus _____

Proposed streets as recorded under the permanent system of highways plan, thus _____

New streets proposed to be established under public act No. 435 approved March 4th 1913, thus _____

Proposed streets to be eliminated from the plans of the permanent system of highways plan under authority of the above act, thus _____

Property lines shown thus _____

Washington, D. C., January 20th 1922

Plat prepared in the Office of the Surveyor of the District of Columbia.

W. J. Boyd
Assistant Surveyor of the District of Columbia

Rec'd for record Sept. 13, 1922 - 2:30 P.M. S.O.D.C.
Recorded in St. Ex. Book 5 page 26 " "
Map # 935
E.D. 11226/248

2. That a decree be passed declaring the assessments for benefits in this case null and void and dissolving the lien upon the property described resulting from said assessment, and perpetually enjoining the collection of all or any portion of said assessment.

3. And for such other and further relief as to the Court may seem meet.

OSCAR WILKINSON.

DISTRICT OF COLUMBIA, ss:

I, Oscar Wilkinson, being first duly sworn, declare that I have read the petition by me subscribed and know the contents thereof; that the statements therein made on my personal knowledge are true and the statements made therein on information and belief I believe to be true.

OSCAR WILKINSON.

Sworn to and subscribed before me this 26 day of June, 1924.

[NOTARIAL SEAL.]

E. B. SHAVER,
Notary Public, D. C.

FRED. G. COLDREN,
WM. M. LEWIN,
Attorneys for Plaintiff.

(Here follows diagram marked page 13.)

14 *Answer of the Commissioners of the District of Columbia.*

Filed August 11, 1924.

* * * * *

Now come Cuno H. Rudolph, James F. Oyster and J. Franklin Bell, Commissioners of the District of Columbia, and for answer to the bill of complaint filed herein say:

1 to 11. Answering paragraphs 1 to 11 of said bill of complaint, defendants admit the allegations therein contained.

12. Answering paragraph 12 of said bill of complaint, defendants admit the allegations therein contained. Fur-

ther answering said paragraph, defendants say that prior to the submission of said plat by the Commissioners of the District of Columbia to the Highway Commission, recommending said change in the location of Crittenden Street and the amendment of the highway plans accordingly, public notice of not less than fourteen consecutive days excluding Sundays was given that a hearing would be had by the Commissioners of the District of Columbia with reference to the proposed amendment to the highway plan and such public hearing was had, as required by Sec. 6 of the Act of June 28, 1898, referred to by the complainant in paragraphs 6 and 7 of his bill of complaint, and all other steps were taken by said Commissioners and by the Highway Commission, to constitute the said amendment of the highway plan, changing the location of Crittenden Street, a legal amendment of said highway plan in accordance with the requirements of law.

13. Answering paragraph 13 of said bill of complaint, defendants admit the allegations therein contained. Further answering said paragraph, defendants attach hereto, and pray to be read as a part hereof, the following certified copies of pleadings and orders in said District Court cause No. 1550: Certified copy of petition of condemnation, marked "Defendants' Exhibit No. 1"; certified copy
15 of notice and order of publication, marked "Defendants' Exhibit No. 2"; certified copy of order to return verdict, marked "Defendants' Exhibit No. 3"; certified copy of order ratifying and confirming verdict, marked "Defendants' Exhibit No. 4."

14. Answering paragraph 14 of said bill of complaint, defendants admit the allegations therein contained.

15. Answering paragraph 15 of said bill of complaint, defendants admit the allegations therein contained, except as to a possible inference that might be drawn from the use of the word "attempted" in the expressions "attempted to be projected on the amended highway plan," "an attempted amendment of the highway plan," if by the use of the word "attempted" complainant intends to question the sufficiency and validity of the said amendment of the highway plan, and as to any such possible inference, defendants deny that said amendment is not legal, but, on the contrary, say that all steps were taken by the Commis-

sioners of the District of Columbia and by the Highway Commission to comply with the law as to such amendment, as more particularly recited by the complainant in his bill of complaint in paragraph 12 and the answer herein above of the defendants to said paragraph.

16. Answering paragraph 16 of said bill of complaint, defendants admit the allegations therein contained, except as to any inference that might be drawn from the use of the words "attempted amendment," as to which words, defendants refer to their answer to paragraph 15 of said bill of complaint and pray that their answer in that respect in said paragraph 15 may be adopted as their answer in this respect as to paragraph 16 of said bill of complaint. Further answering said paragraph 16, defendants attach hereto and pray to be read as a part hereof certified copy of the verdict of the jury therein referred to, marked "Defendants' Exhibit No. 5."

16 17. Answering paragraph 17 of said bill of complaint, defendants have no knowledge as to whether or not plaintiff did have *actual* notice or knowledge of the filing of said condemnation suit and the proceedings had therein, and therefore can neither admit nor deny the same and if the same be material to the issues herein involved, call for strict proof thereof. Further answering said paragraph, defendants say that they are advised, that as a matter of law, it is immaterial whether or not plaintiff did have actual notice of the filing of said condemnation suit and of the proceedings taken therein during the pendency and conclusion of the same for the reason that the statute does not require notice to be served upon any save those whose property is to be condemned in said proceeding, sections 491b and 491c contained in subchapter 1 of chapter 15 of the Code of Law for the District of Columbia providing as follows:

"Sec. 491b. Such petition shall contain a particular description of the land to be condemned and the names of the owners of the fee of said land and their residences, so far as the same may be ascertained, together with a plan of the land to be taken.

"Sec. 491c. The said court shall cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily news-

papers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits by the jury herein provided for; and in addition to such public notice said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia or his deputies, upon such owners of the land to be condemned as can be found by said marshal, or his deputies, within the District of Columbia and upon the tenants and occupants of the same. The said court shall appoint a guardian ad litem for any person interested in the proceeding who may be under disability."

That as shown by the certified copy of said petition, hereto attached, and to which reference has heretofore been made, and as also shown by said bill of complaint, in paragraph 15 thereof, plaintiff is not an owner of any of the
17 land that was condemned in said condemnation proceedings and therefore process was not served upon him.

Further answering said paragraph, defendants say that said Section 491c, above quoted, does require that public notice of not less than twenty days be given of the institution of said proceedings by advertisement in three daily newspapers, warning and requiring *all persons* having any interest in the proceedings to appear therein and to continue in attendance until the Court shall have made its final order ratifying and confirming the verdict. That, as shown by the certified copy of the "notice and order of publication," marked "Defendants' Exhibit No. 2," hereto attached and heretofore referred to, the Court, in said condemnation proceedings, signed an order of notice of publication directing "That all persons having any interest in these proceedings, be and they are hereby warned and commanded to appear in this Court on or before the 28th day of December, 1922, at 10 o'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the *assessment of benefits* of the jury to be empaneled and sworn herein," and said Court further ordered, in said

notice and order of publication, "That a copy of this notice and order be published twice a week for two successive weeks in the Washington Evening Star, the Washington Times, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 28th day of December, 1922." That defendants did cause a copy of said notice and order of publication to be published in each of said papers in the issues of December 6, 7, 13 and 14, 1922, and sworn proof of said publication, in due form, was filed in said proceedings, and the requirements of the statute and of said order of the Court in every respect fully complied with as to the giving of said

public notice. Further answering said paragraph, 18 defendants say that Section 491h of said sub-chapter 1 of chapter 15 of said Code provides that objections or exceptions to the verdict must be filed within twenty days after the return of the verdict to the Court. That plaintiff did not file objections or exceptions to said verdict within said period or at any other time. That, as stated in paragraph 13 of the bill of complaint, said verdict was filed on June 29, 1923, and was not ratified until July 30, 1923, a period of thirty-one days after the filing of said verdict, thereby having given full time and more to all persons who wished to file objections or exceptions to said verdict.

18. Answering paragraph 18 of said bill of complaint, defendants say that as to the allegations therein stating, in substance, that plaintiff derived no benefits from the opening of said Crittenden Street by way of the enhancement of value of his property, but, on the contrary, sustained damage thereto, defendants are advised that such allegations are irrelevant and immaterial in the instant proceeding, as constituting a matter of fact, provided by law to be passed upon by the jury in the said condemnation proceedings and not subject to review in the instant proceeding, and that therefore defendants are not required to answer the same. Answering in the alternative, however, defendants say that the verdict of the jury, after mature deliberation between the taking of said testimony on the 8th day of March, 1923, and the filing of said verdict on the 29th day of June, 1923, does find and assess benefits to the property of plaintiff in the sum of \$3,300, said verdict having been arrived at after the jury had personally been upon the

ground and viewed the premises as required by law and had before it for consideration, among other things, the following testimony as to plaintiff's property adduced at said hearing on March 8, 1923:

19 “Q. Will you state, please, what in your opinion the benefits are? A. In my judgment there is a slight benefit to the remaining part of Lot 14, of only 6 and a fraction feet less, a narrow strip, but the abutting property to the north is very deep, and will undoubtedly demand it. My estimate is in the neighborhood of 25 cents a square foot for the remaining part of Lot 14, about \$350. Lot 18, Square 2653, at 25 cents a square foot for the rear 100-foot frontage on the new street. The balance of the lot frontage, at 10 cents a square foot, frontage on 16th Street at 10 cents a square foot, Lot 8, Square 2653, at 30 cents a square foot.

The foregoing testimony, given by Mr. Harold E. Doyle, Vice President of Thomas J. Fisher & Company, Incorporated, a real estate expert of thirty years experience and a recognized authority, estimates benefits to Lot 18, the property of the plaintiff which, by calculation, approximate between \$3100 and \$3200.

Further answering said paragraph, in the alternative, defendants admit, as stated therein, that “The law requires that the jury in assessing benefits must consider only an actual enhancement of value of the property against which an assessment of benefits is made,” and defendants attach hereto a certified copy of the instructions given to said jury and pray that the same may be read as a part hereof, the same being marked “Defendants’ Exhibit No. 6,” and defendants say that it will be noted that said jury was instructed in Instruction No. 6 that they must not assess benefits arbitrarily but only where they should find an enhancement in market value as theretofore explained, and defendants further invite attention to Instruction No. 10,

20 wherein the jury was advised that while they should take into consideration the opinions of the witnesses who testified as to the values and benefits and give to such opinions the weight to which the jury might think them fairly entitled they should not be bound by such evidence but might use their own knowledge in connection therewith, based upon their view of the premises, but that

they should not reject any of the testimony without sufficient reason therefor. Further answering said paragraph, defendants say, in the alternative, that they have no personal knowledge as to whether or not the property of the plaintiff was actually benefited or damaged by the opening of said Crittenden Street as aforesaid, and therefore can neither admit nor deny the same, but they are informed and believe and hence aver that said property was benefited and not damaged by the opening of said Crittenden Street. Further answering said paragraph, in the alternative, defendants will admit, for the purpose of this proceeding, that plaintiff had under construction a house upon his lot with vacant space to be provided along the sides thereof and that his lot does run back to a thirty foot alley, and that it does have access to his premises either from 16th Street or from said thirty foot alley and that his property does not abut immediately upon Crittenden Street. Further answering said paragraph, in the alternative, defendants admit that the extension of Crittenden Street within the boundaries condemned will destroy certain forest trees and that after the opening of said street, plaintiff's property will front upon a space ninety feet wide and will virtually be a corner lot with the exception of a six foot strip along the Crittenden Street boundary thereof, but defendants cannot say at this time whether all trees will be removed from said street or whether some of them will be left along the line of the street as shade trees as in other

cases but do say that only a portion of such street
21 will be roadway and the other portions will be sidewalk and parking. The other allegations in said paragraph bearing upon the question of benefit or damage have heretofore been answered herein.

19 & 20. Answering paragraphs 19 and 20 of said bill of complaint, defendants say that the land taken in said condemnation proceedings for the opening of Crittenden Street was land required for the opening of said street in accordance with the plan of the Permanent System of Highways, adopted under the Act of March 3, 1893, as amended by the Act approved June 28, 1898, as authorized by the Act of March 4, 1913, and that the Commissioners did not act without authority of law in opening said Crittenden Street in said condemnation proceedings.

Further answering said bill of complaint, defendants say that plaintiff has slept upon his rights, if any cause of complaint he did have, and has been guilty of laches and delay in the protection of such supposed rights and is not entitled to consideration in this Honorable Court by reason thereof.

Having fully answered the bill of complaint herein filed, defendants pray that said bill of complaint be dismissed with their costs in this behalf incurred.

JAS. F. OYSTER,
J. F. BELL,

*Commissioners of the District
of Columbia, Defendants.*

F. H. STEPHENS,
GEORGE P. BARSE,
Attorneys for Defendants.

DISTRICT OF COLUMBIA, ss:

Cuno H. Rudolph, James F. Oyster and J. Franklin Bell, Commissioners of the District of Columbia, being duly sworn, depose and say that they have read the answer by
22 them subscribed and know the contents thereof; and
that the matters and things set forth upon their personal knowledge are true, and those stated upon information and belief they believe to be true.

JAS. F. OYSTER.
J. F. BELL.

Subscribed and sworn to before me this 11th day of August, 1924.

[NOTARIAL SEAL.] JOSEPH C. MCGARRAGHY,
Notary Public, D. C.

DEFENDANTS' EXHIBIT No. 1.

Filed Nov. 27, 1922. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court No. 1550.

In re Condemnation of Land for the Extension of Crittenden Street Northwest Between 16th and 17th Streets, in the District of Columbia.

Petition.

The petition of Cuno H. Rudolph, James F. Oyster and Charles Keller, respectfully represents:

1. That they are the Commissioners of the District of Columbia, and as such Commissioners institute this proceeding under the authority of a certain provision of the Act of Congress approved March 4th, 1913, entitled "An Act making appropriations for the government of the District of Columbia for the fiscal year ending June 30th, 1914, and for other purposes," which provision reads
23 as follows:

"That the Commissioners of the District of Columbia are hereby authorized to open, extend, or widen any street, avenue, road, or highway to conform with the plan of the permanent system of highways in that portion of the District of Columbia outside of the cities of Washington and Georgetown, adopted under the Act of Congress approved March second, eighteen hundred and ninety-three, as amended by the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, by condemnation under the provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia: Provided, That the entire amount found to be due and awarded by the jury under such proceedings as damages for and in respect of the land condemned, plus the cost and expenses of said proceedings, shall be assessed by the jury as benefits."

2. That your petitioners, by virtue of the foregoing provision, have officially ordered the extension of Crittenden Street, northwest, between 16th and 17th Streets, in the District of Columbia, and in furtherance thereof file this petition according to the provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia, for the purpose of acquiring the hereinafter described land for the said extension of Crittenden Street, as aforesaid.

3. That the said extension of Crittenden Street, northwest, conforms with the plan of the permanent system of highways in that portion of the District of Columbia outside of the Cities of Washington and Georgetown, adopted under the Act of Congress approved March 2nd, 1893, as amended by the Act of Congress approved June 28th, 1898.

4. That a map or plat showing the land to be taken for the said extension of Crittenden Street, northwest, between 16th and 17th Streets, in the District of Columbia, is hereto annexed as part of this petition and marked "Exhibit D. C., No. 1."

5. That the land necessary for the said extension of Crittenden Street, northwest, between 16th and 17th Streets, in the District of Columbia, together with the names
24 and residences of the owners of the fee thereof, as far as the same can be ascertained, is particularly described as follows:

Descriptions of land to be condemned for the extension of Crittenden Street between Sixteenth and Seventeenth streets northwest.

All of a tract of land taxed as Parcel 71/30, Containing 14,712.10 square feet. Annie Kirkland Warren, owner. (Residence: 3800 14th St., N. W.); also c/o Bates Warren, Atty., Southern Bldg.

Square 2653. Part of Lot 14. Beginning for the same at the southeast corner of said lot, in the west line of 16th Street (160 feet wide), and running thence with the southerly line of said lot, northwesterly 225.15 feet to the easterly line of a road 33 feet wide; thence with said easterly line, north $6^{\circ} 28' 40''$ east 12.56 feet to the proposed north line of Crittenden Street (90 feet wide); thence with

said proposed north line, east 222.22 feet to the west line of 16th Street (160 feet wide); thence with said west line, south 39 feet to the point of beginning, containing 5,747.60 square feet.

Thomas A. Gorman, owner. (Residence: 2722 Ontario Road, N. W.)

WAW.

Wherefore, the premises considered, and in accordance with the further provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia, your petitioners pray as follows:

1. That this Honorable Court may cause public notice of not less than twenty days to be given of the institution of these proceedings by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceedings to appear in this Court at a day named in said notice, and to continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of the benefits by the jury; and shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by the said marshal, or his deputies, within the District of Columbia, and upon tenants and occupants of the same.

2. That this Honorable Court shall empanel a jury in accordance with the law provided for in such cases, to ascertain the damages each owner of the land taken may sustain by reason of the aforesaid extension of the said street and the condemnation of the land necessary for the same, and to assess the benefits resulting therefrom in accordance with the provisions of the aforesaid Act of Congress and the aforesaid subchapter one of chapter fifteen of the Code.

3. That such other and further orders may be passed and proceedings had herein as are contemplated by the aforesaid Act of Congress, to the end that the aforesaid land may be condemned and secured for the said extension of

Crittenden Street, northwest, between 16th and 17th Streets, as aforesaid.

CUNO H. RUDOLPH,
JAS. F. OYSTER,
C. KELLER,

Commissioners of the District of Columbia.

F. H. STEPHENS,
GEORGE P. BARSE,
Attorneys for Petitioners.

26 DISTRICT OF COLUMBIA, ss:

Personally appears C. Keller, who being first duly sworn according to law, deposes and says that he is one of the Commissioners of the District of Columbia; that he has read the foregoing petition of said Commissioners, and knows the contents thereof, that the facts therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

C. KELLER.

Subscribed and sworn to before me this 25th day of November, A. D., 1922.

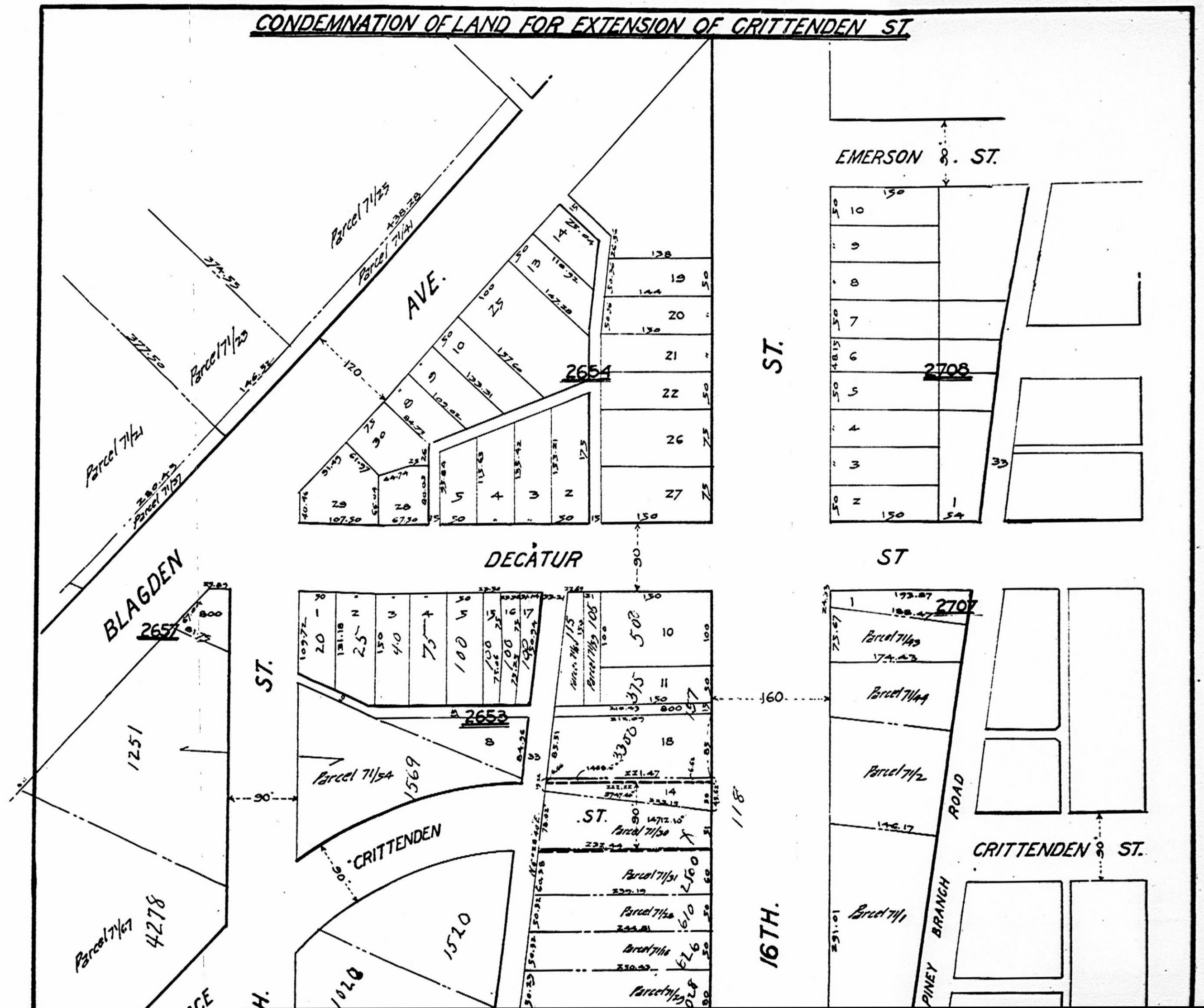
WILLIAM TINDALL,
Notary Public, District of Columbia.

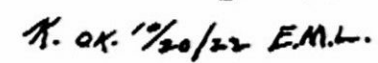
A true copy. Test:
[SEAL.]

MORGAN H. BEACH,
Clerk,
By F. E. CUNNINGHAM,
Asst. Clerk.

(Here follows diagram marked page 27.)

No. 4612
 Oscar Wilkinson, Appellant,
 vs.
 Proctor L. Dougherty, et al.
 (Page 27)





28 Filed Nov. 27, 1922. Morgan H. Beach, Clerk.

DEFENDANTS' EXHIBIT No. 2.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court, No. 1550.

In re Condemnation of Land for the Extension of Crittenden Street Northwest Between 16th and 17th Streets, in the District of Columbia.

Notice and Order of Publication.

Notice is hereby given, that the Commissioners of the District of Columbia (pursuant to a certain provision of the Act of Congress, approved March 4, 1913, entitled, "An Act making appropriations for the expenses of the government of the District of Columbia, for the fiscal year ending June thirtieth, nineteen hundred and fourteen, and for other purposes," whereby they are authorized to open, extend or widen any street, avenue, road or highway to conform with the plan of the permanent system of highways in that portion of the District of Columbia outside of the cities of Washington and Georgetown adopted under the Act of Congress approved March 2, 1893, as amended by the Act of Congress approved June 28, 1898, by condemnation under the provisions of subchapter one of chapter fifteen of the code of Law of the District of Columbia), have filed a petition in this Court praying the condemnation of the land necessary for the extension of Crittenden Street, northwest, between 16th and 17th streets, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that this Court empanel a jury in accordance with the law provided for in such cases to assess the damages each owner of land to be taken
29 may sustain by reason of the said extension of Crittenden Street, northwest, between 16th and 17th Streets, in the District of Columbia, and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said

damages, including the expenses of these proceedings, upon any lands which the jury may find will be benefited, as provided for in and by the aforesaid Act of Congress. It is by the Court, this 27th day of November, 1922,

Ordered, That all persons having any interest in these proceedings, be and they are hereby warned and commanded to appear in this Court on or before the 28th day of December, 1922, at 10 o'clock A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein; and it is further Ordered, That a copy of this notice and order be published twice a week for two successive weeks in the Washington Evening Star, the Washington Times and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 28th day of December, 1922. It is further Ordered, That a copy of this notice and order be served by the United States Marshal, or his deputies, upon each of the owners of the fee of the land to be condemned herein as may be found by the said marshal or his deputies, within the District of Columbia, and upon the tenants and occupants of the same, before the said 28th day of December, 1922.

By the Court:

F. L. SIDDONS,
Justice.

A true copy. Test:

[SEAL.]

MORGAN H. BEACH,
Clerk.

By F. E. CUNNINGHAM,
Asst. Clerk.

Served Annie Kirkland Warren, by Bates Warren, agent, personally, Dec. 16, 1922, and Thomas A. Gorman personally, Dec. 16, 1922.

E. C. SNYDER,
U. S. Marshal.

K.

Filed June 28, 1923. Morgan H. Beach, Clerk.

DEFENDANTS' EXHIBIT No. 3.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court, No. 1550.

In re the Extension of Crittenden Street Between 16th and
17th Streets Northwest, in the District of Columbia.

Order to Return Verdict.

The Court having been notified that the jury heretofore
sworn herein are ready to return their verdict, it is by the
Court this 28th day of June, A. D., 1923, Ordered:

That the said jury appear and return their verdict in
open Court on the 29th day of June, 1923, at ten o'clock,
A. M., in Equity Court Number One.

By the Court:

WALTER I. McCOY,
Chief Justice.

A true copy. Test:
[SEAL.]

MORGAN H. BEACH,
Clerk,

By ————,
Asst. Clerk.

31 Filed July 30, 1923. Morgan H. Beach, Clerk.

DEFENDANTS' EXHIBIT No. 4.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court No., 1550.

In re the Extension of Crittenden Street Between 16th and
17th Streets northwest, in the District of Columbia.

Order Ratifying and Confirming Verdict.

On motion of the Commissioners of the District of Co-
lumbia, petitioners herein, by their counsel, and it appear-

ing to the Court that the objections and exceptions heretofore filed herein by Arthur L. Bliss and Dean E. Brown, Tr., were withdrawn on the 28th day of July, 1923, and no other objections or exceptions have been taken to the verdict of the jury returned herein on the 29th day of June, 1923, it is by the Court this 30th day of July, 1923, ordered:

That the said verdict, awards and assessments be, and the same are hereby in all respects finally ratified and confirmed.

And it is further Adjudged, Ordered and Decreed, that upon the payment of the several awards to the parties thereto entitled, or into the registry of the Court, in accordance with the provisions of Section 491, of the Code of Law for the District of Columbia, the several pieces or parcels of land mentioned and described in said verdict shall become and be the property of the District of Columbia for the purpose of a public street, between 16th and 17th Streets, northwest, in the District of Columbia,
32 for which this proceeding was instituted.

By the Court:

JENNINGS BAILEY,
Justice.

Objections and exceptions filed by Arthur L. Bliss and Dean E. Brown, Trustees, withdrawn.

CHARLES FAHY,
Their Attorney.

A True Copy—Teste:

[SEAL.]

MORGAN H. BEACH,
Clerk,

By —, —,
Asst. Clerk.

Filed June 29, 1923. Morgan H. Beach, Clerk.

DEFENDANTS' EXHIBIT No. 5.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court No. 1550.

In re the Extension of Crittenden Street between 16th and
17th Streets Northwest, in the District of Columbia.

Verdict of Jury.

We, the jury in the above entitled cause, hereby find the following verdict and award of damages for and in respect of the land to be condemned and taken for the extension of Crittenden Street, between 16th and 17th streets, northwest, in the District of Columbia, as shown on a map or plat filed with the petition in this cause, amounting to the sum of Twenty-four thousand, one hundred, forty-two, and 45/100 dollars (\$24,142.45), as set forth in Schedule
33 No. 1, hereto annexed as part hereof.

And we, the jury aforesaid, hereby find the expenses of these proceedings to amount to the sum of Four hundred, eighty six, & 05/100 dollars (\$486.05).

And we, the jury aforesaid, hereby find the amount of benefits accruing by reason of the condemnation of land necessary for the extension of Crittenden street, between 16th and 17th streets, as aforesaid, to be the sum of Twenty-four thousand, six hundred, twenty-eight and 50/100 dollars (\$24,628.50).

And we, the jury aforesaid, find that the lots, pieces or parcels of land which will be benefited by the aforesaid extension of Crittenden street, between 16th and 17th streets, in the District of Columbia, are the lots or parts of lots, pieces or parcels of land mentioned and described in Schedule No. 2, hereto annexed as part hereof; and we hereby find that the several lots, or parts of lots, pieces or parcels of land mentioned in said Schedule No. 2 will be benefited to the extent of the respective amounts mentioned and set forth in said Schedule No. 2, and we hereby assess against the said lots, or parts of lots, pieces or parcels of land, re-

spectively, as and for benefits, as aforesaid, the several amounts specified and set forth in said Schedule No. 2.

Witness our hands and seals, this 29th day of June, 1923.

HARRY E. GLADMAN. [SEAL.]

L. L. PITSNOGLE. [SEAL.]

HENRY LANSBURGH. [SEAL.]

JESSE R. SHERWOOD. [SEAL.]

L. PIERCE BOTELE. [SEAL.]

SCHEDULE No. 1.

Damages.

Amount
awarded
as damages.

All of a tract of land taxed as Parcel 71/30, containing 14,712.10 square feet	\$17,360.28
Square 2653. Part of Lot 14. Beginning for the same at the southeast corner of said lot, in the west line of 16th street (160 feet wide), and running thence with the southerly line of said lot, northwesterly 225.15 feet to the easterly line of a road 33 feet wide; thence with said easterly line, north 6° 28' 40" east 12.56 feet to the proposed north line of Crittenden Street (90 feet wide); thence with said proposed north line, east 222.22 feet to the west line of 16th street (160 feet wide); thence with said west line, south 39 feet to the point of beginning, containing 5,747.60 square feet	6,782.17

Costs and expenses:

Clerk of Court	\$18.65	
Advertising	143.40	
Stenographer	24.00	
Expert Witnesses	50.00	
Jurors	250.00	
		486.05
Total		\$24,628.50

SCHEDULE No. 2.

Benefits.

Square 2653:

	Amount assessed as benefits.
Lot 1	\$20.00
Lot 2	25.00
Lot 3	40.00
Lot 4	75.00
Lot 5	100.00
Lot 8	420.00
Lot 10	500.00
Lot 11	375.00
35 Lot 15	100.00
Lot 16	100.00
Lot 17	100.00
Lot 18	3,300.00
Lot 800	157.50
Parcel 71/31	2,500.00
Part of Parcel 71/73 (Center Portion)	1,569.23
Part of Parcel 71/73 (South-east Portion)	1,520.00
Part of Parcel 71/72 (Northeastern Portion) ..	1,020.00
Parcel 71/28	610.00
Parcel 71/16	626.00
Parcel 71/29	1,028.00
Parcel 71/59	105.00
Parcel 71/60	115.00
Part of Parcel 71/73 (Western Portion)	1,251.00
Part of Parcel 71/72 (Western Portion)	4,278.49
Part of Parcel 71/72 (Southeastern Portion) ..	1,528.40
Part of Parcel 70/94 (Eastern Portion)	1,206.08
Part of Parcel 70/94 (Western Portion)	1,958.80
 Total	 \$24,628.50

A true copy. Test:

[SEAL.] MORGAN H. BEACH,

Clerk,

By F. E. CUNNINGHAM,

Asst. Clerk.

36 Filed Mar. 8, 1923. Morgan H. Beach, Clerk.

DEFENDANTS' EXHIBIT No. 6.

In the Supreme Court of the District of Columbia, Holding
a District Court.

District Court No. 1550.

In re Condemnation of Land for the Extension of Crittenden Street Northwest Between 16th and 17th Streets, in the District of Columbia.

Instructions.

1. Gentlemen of the jury, your duties are, first, to ascertain the damage which will be suffered by the respective owners of the several parcels of land condemned by these proceedings. You are instructed that the several parcels of land to be condemned are to be appraised at their fair market value, with reference to the most advantageous use or uses to which they can be respectively put. By fair market value is meant what the property would sell for in cash, or terms equivalent to cash, when offered for sale by one who is willing but is not obliged to sell to one who desires but is not obliged to buy.

2. After ascertaining the amount of damages to be awarded to the owners of the parcels to be condemned, you shall proceed to assess the full amount of such damages, together with the costs and expenses of this proceeding, as benefits, provided you shall find benefits in such amount actually to exist from the evidence, against any and all parcels of land in the District of Columbia which you find from the evidence will be benefited. In determining the amount to be assessed against any parcel of land you shall take carefully into consideration the respective situations and topographical conditions of said parcels of land
37 and the special benefits and advantages they will severally receive. In assessing benefits against the properties found to be benefited, you shall take into consideration the benefits and advantages such properties may severally receive from the opening, and extension of said street as contemplated by said improvement project as

shown by these proceedings. By the opening, and extension of said street the jury are to understand establishment, laying out, and completion for all the ordinary purposes of a public thoroughfare.

3. You shall make up your assessment of costs by including the following items: The clerk's costs, which will be certified by the clerk of the court; — dollars to each of the — expert witnesses produced by the petitioners; costs of the stenographic record of these proceedings; costs of publication in this proceeding in such sum as is certified by the clerk; and five dollars per day for each member of the jury for each day the jury shall have already engaged in this cause or shall hereafter actually devote in deliberations in this cause in meeting assembled and with every juror present.

4. After ascertaining the full amount of benefits which all of the parcels of land in the District of Columbia will receive from the proposed condemnation, you shall, where part of any parcel or tract of land has been already dedicated for the purposes of this proceeding take into consideration the fact of such dedication and the present value of the land dedicated, in determining whether the remainder of said parcel or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon.

5. Having determined the amount of damages, and thereafter determined the amount of benefits, and after
38 having also determined the deductions, if any, to be made on account of dedications as aforesaid, if the total of the benefits which you find to be assessed shall then be in excess of the total damages plus the costs and expenses of this proceeding, you will then proportionally scale down the benefits actually found so that the benefits will equal the damages, plus the costs and the expenses of this proceeding. If, however, after full consideration and deliberation you shall not find, from the evidence, that benefits to the extent of the entire amount of the damages plus the costs and expenses will accrue from the purposes of this proceeding, or if you shall be unable to make a finding from the evidence either as to the damages or as to the benefits in any one or more particulars or respects, then, and in such case, you shall not return a verdict, but shall report the facts to the court.

6. You are instructed that you must not assess benefits arbitrarily, but only where you find that an enhancement in market value, as heretofore explained, will result.

7. You are instructed that if a part only of any lot, piece or parcel of land is to be condemned, the measure of damages is the difference in value between each whole lot, piece or parcel of land, and the value of what will remain after the part is taken; but you shall not take into consideration, in making your award for the part taken, any benefits that may accrue to the remainder thereof, but such benefits shall be considered by the jury in determining what assessment, if any, shall be made or levied against such part of such lot, piece or parcel of land, as may not be taken.

8. The jury in assessing benefits shall not take into consideration any benefits which they believe may accrue from the laying of sidewalks, or curbs, or paving, or any other improvements for which the property owner will
39 have to make further payments, such benefits not being a part of this proceeding.

9. You are instructed that the burden of proof rests upon the petitioners, the Commissioners of the District of Columbia, to establish the existence and extent of such benefits with respect to the particular parcels of land, and the petitioners must meet such burden with evidence before any assessment of benefits can be made.

10. You shall take into consideration the opinions of the witnesses who have testified as to values and benefits, and give to such opinions the weight to which the jury may think them fairly entitled. You shall not be bound by such evidence, however, but may use your own knowledge based upon your view of the premises in making up your assessments of damages and benefits, though you are not at liberty to reject any testimony, whether opinions of experts or not, without sufficient reason therefor.

11. The jury may consult its own convenience as to the time and place of meeting for the purpose of deliberation, but should endeavor to reach a conclusion and return its verdict as speedily as possible. The verdict should be in writing, signed by them or a majority of them, and should be returned to the court.

12. The jury, during the course of its deliberations, may at its own convenience and without application to either

court or counsel, make such further views of the properties involved as it may deem necessary.

(Signed) F. L. SIDDON,
Justice.

A true copy. Test:
[SEAL.]

MORGAN H. BEACH,
Clerk,
By F. E. CUNNINGHAM,
Asst. Clerk.

40

Memorandum of Justice Bailey.

Filed February 5, 1927.

* * * * *

While this case seems one of the great hardship to the plaintiff, it would seem that all the provisions of the law had been complied with in the condemnation proceedings.

It results therefore that the bill should be dismissed with costs.

BAILEY, J.

Final Decree.

Filed February 24, 1927.

* * * * *

This cause came on to be heard at this term and it appearing to the satisfaction of the Court that the condemnation of the plaintiff's land for the extension of Crittenden Street in the condemnation proceedings in this cause mentioned was authorized by law and that all the provisions of law were complied with in said condemnation proceedings, it is this 24th day of February, A. D., 1927, Adjudged, Ordered and Decreed as follows, viz:

That the bill of complaint filed in the above-entitled cause be, and the same is hereby, dismissed, and that the defendants recover against the plaintiff their costs, to be taxed by the Clerk, and have execution thereof.

By the Court:

JENNINGS BAILEY,
Justice.

41 From the foregoing decree the plaintiff in open Court duly notes an appeal to the Court of Appeals of the District of Columbia, and, upon due application, the plaintiff's understaking for costs on said appeal is fixed at a maximum penalty of \$100.00, but the plaintiff is hereby given leave to deposit \$50.00 with the Clerk of the Supreme Court of the District of Columbia in lieu of such undertaking.

JENNINGS BAILEY,
Justice.

Approved as to form:

F. H. STEPHENS,
ROBT. L. WILLIAMS,
For Defts.

Memorandum.

February 26, 1926.

\$50 deposited by plaintiff in lieu of bond on appeal.

Order Substituting Defendants.

Filed March 8, 1927.

* * * * *

Upon application of counsel for the plaintiff, counsel for the defendants consenting hereto, and it appearing to the Court that Cuno H. Rudolph and James F. Oyster are no longer Commissioners of the District of Columbia, and that since the institution of these proceedings Proctor L. Dougherty and Sidney F. Taliaferro have been duly appointed such Commissioners, and, together with the defendant, J. Franklin Bell, are now the Commissioners of said District, it is, this 8th day of March, 1927, Adjusted, Ordered and Decreed that the said Proctor L. Dougherty and the said Sidney F. Taliaferro be, and they hereby
42 are, substituted as defendants in the place and stead of the said Cuno H. Rudolph and James F. Oyster.

It is further adjudged, ordered and decreed that the final decree heretofore passed in the above entitled cause, and the plaintiff's appeal from such decree to the Court of

Appeals of said District, stand as if such substitution had been made prior to the date of said decree.

By the Court.

JENNINGS BAILEY,
Justice.

We consent:

WM. MEYER LEWIN,
Attorney for Plaintiff.

F. H. STEPHENS,
ROBT. L. WILLIAMS,
Attorneys for Defendants.

Assignment of Errors.

Filed March 11, 1927.

* * * * *

1. The Court erred in dismissing the bill.
2. The Court erred in holding that the condemnation proceedings mentioned in the above-entitled cause were authorized by law.
3. The Court erred in holding that all the provisions of law were complied with in the condemnation proceedings mentioned in the above-entitled cause.

WM. MEYER LEWIN,
Attorney for Plaintiff.

Received a copy this 11th day of March, 1927.

F. H. STEPHENS,
ROBT. L. WILLIAMS,
Attorneys for Defendants.

43 *Designation of Record on Appeal.*

Filed March 11, 1927.

* * * * *

The Clerk of the Court will please prepare the Record on Appeal in the above-entitled cause and include therein the following:

1. The bill.
2. The Answer, including Exhibits.

3. Justice Bailey's Memorandum.

4. The final decree, noting of appeal and fixing of undertaking on appeal, with leave to make deposit with Clerk in lieu of such undertaking.

5. Memorandum of deposit in lieu of undertaking.

6. Order substituting parties defendant.

7. All orders referring to submission and settlement of statement of evidence.

8. State ment of evidence.

9. Assignments of Error.

10. This designation of Record.

WM. MEYER LEWIN,
Attorney for Plaintiff.

Receipt of copy acknowledged, this 11th day of March, 1927.

F. H. STEPHENS,
ROBT. L. WILLIAMS,
Attorneys for Defendants.

44

Memoranda.

March 17, 1927.—Order extending time to file Bill of Exceptions and Statement of Evidence to and including April 6, 1927.

March 29, 1927.—Statement of Evidence & notice & ackl. filed.

April 29, 1927.—Statement of Evidence submitted and signed.

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42794 in Equity, wherein Oscar Wilkinson is Plaintiff and Cuno H. Rudolph et al., Commissioners of the District of Columbia, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of June, 1927.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

46 In the Supreme Court of the District of Columbia.

Equity, No. 42,794.

OSCAR WILKINSON, Plaintiff,

vs.

CUNO H. RUDOLPH et al., Defendants.

Statement of Evidence.

Be it remembered that at the trial of the above entitled cause on the 11th day of November, A. D. 1926, before Mr. Justice Bailey, holding an Equity Court, the following proceedings were had and evidence given:

Oscar Wilkinson, the plaintiff, called as a witness on his own behalf, testified as follows:

That for more than twenty-five years last past he has been a practicing physician in the District of Columbia and resides at 4700 Sixteenth Street, Northwest, the property involved in said cause, of which said property he is, and for six years last past has been, the owner; that he had no actual notice at any time prior to October, A. D. 1923, of the condemnation proceedings mentioned or referred to in the bill of complaint, nor of the assessment in said bill mentioned or referred to, and that he had no knowledge of said condemnation proceedings, nor of said assessment, at any time prior to said October, A. D. 1923; that there is a strip of land between six feet and seven feet in width between Crittenden Street as extended and the plaintiff's said property, Lot 18, Square 2653, and that such extension of Crittenden Street, instead of being beneficial, is detrimental to his said property. Thereupon the evidence in the said cause was concluded and the decision of the Court reserved pending the submission of briefs by the respective counsel.

And be it further remembered, that the plaintiff has tendered this as a statement of the evidence taken on the hearing of the issues involved for use on the plaintiff's appeal to the Court of Appeals of said District from the
47 final decree entered by the Court herein on the 24th day of February, A. D. 1927; and the said statement of evidence is found to be correct and true and to contain in substance all the evidence taken on said hearing of said issues, and the said statement is hereby allowed, signed and filed nunc pro tunc and made a part of the record this 29th day of April, 1927.

JENNINGS BAILEY,
Justice.

48 In the Supreme Court of the District of Columbia.

Equity, No. 42,794.

OSCAR WILKINSON, Plaintiff,

vs.

CUNO H. RUDOLPH et al., Defendants.

Messrs. Francis H. Stephens,
Robert L. Williams,
Attorneys for Defendants:

Please take notice that I have this day filed the statement of evidence in the above entitled cause, a copy of which statement is attached hereto, and that I will submit the same to Mr. Justice Bailey for approval, April 29th, 1927, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

WM. MEYER LEWIN,
Attorney for Plaintiff.

Service of copy accepted this 29th day of March, A. D. 1927.

F. H. STEPHENS,
R. L. WILLIAMS,
F. H. S.
Attorneys for Defendants.

49 [Endorsed:] Equity No. 42,794. Oscar Wilkinson, Plaintiff, vs. Cuno H. Rudolph et al., Defendants. Statement of evidence and notice to counsel for defendant. Please File. Wm. Meyer Lewin, Attorney for Plaintiff, 344 D Street, N. W.

Endorsement on cover: District of Columbia Supreme Court. No. 4612. Oscar Wilkinson, Appellant, vs. Proctor L. Dougherty et al. Court of Appeals, District of Columbia. Filed Jun. 9, 1927, Henry W. Hodges, clerk.

(6893)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

BRIEF FOR APPELLANT

OCT 6 - 1927

IN THE

Henry H. Hodges
clerk

Court of Appeals

OF THE DISTRICT OF COLUMBIA

April Term, 1927

No. 4612

OSCAR WILKINSON, *Appellant*,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIAFERRO,
AND WILLIAM B. LADUE, COMMISSIONERS OF THE
DISTRICT OF COLUMBIA.

APPELLANT'S BRIEF

WM. MEYER LEWIN,
Attorney for Appellant

IN THE
Court of Appeals

OF THE DISTRICT OF COLUMBIA

April Term, 1927

No. 4612

OSCAR WILKINSON, *Appellant*,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIAFERRO,
AND WILLIAM B. LADUE, COMMISSIONERS OF THE
DISTRICT OF COLUMBIA.

APPELLANT'S BRIEF

STATEMENT OF CASE

This case is here on appeal from a decree (R. 33) of the Supreme Court of the District of Columbia dismissing a bill (R. 2) filed by the appellant to enjoin the Commissioners of the District of Columbia from collecting an assessment for supposed benefits to premises 4700 Sixteenth Street Northwest, resulting from the extension of Crittenden Street between Sixteenth and Seventeenth Streets.

From the averments of the bill, the admissions

contained in the answer (R. 11) and the uncontroverted testimony of the appellant (R. 37) it appears:

That, August 31, 1895 (R. 4), Section 1, of the original highway plan, prepared under the direction of the Act of March 2, 1893, 27 Stat. 532, was duly recorded in the office of the surveyor of the District of Columbia.

Said Section 1 included the plan for the extension, from 16th Street to 17th Street, of the street afterwards named Crittenden Street. (R. 4.)

That, February 11, 1899 (R. 4.), the amended plan of said Section 1, prepared under the direction of the Act of June 28, 1898, 30 Stat. 519, which annulled the prior plan of Section 1, was duly recorded in the surveyor's office, February 11, 1899.

That in this amended plan there was no change (R. 4) of the original location of the street afterwards named Crittenden Street, between 16th Street and 17th Street.

That by Act of March 4, 1913 (37 Stat. 949) (R.4), the Commissioners were authorized to prepare a new highway plan for any portion of the District, such preparation to be in accordance with the provisions of the Act of March 2, 1893, as amended June 28, 1898, and, upon such new plan being approved and recorded, it was to take the place of and stand for any prior plan for the portion of the District affected.

That by the Act of March 4, 1913, the Commissioners were authorized (R. 4-5) to open, extend,

or widen any street, avenue, road or highway to conform with the plan adopted under the Act of March 2, 1893, as amended by the Act of June 2, 1898, such authority to be exercised by condemnation as prescribed by sub-chapter one of chapter fifteen of the Code.

That pursuant to the authority conferred upon them by the Act of March 2, 1893, the Commissioners, with the approval of the Highway Commission, changed the plan of the First Section and the plat embodying the change was recorded in the Surveyor's office September 13, 1922 (R. 6). By this change *Crittenden Street was moved Northward* forty-nine feet, leaving an irregularly shaped strip, between six and seven feet wide (R. 7-8), between the north line of Crittenden Street and the south line of the appellant's property.

That, November 27, 1922, the Commissioners filed a petition in the Supreme Court of the District of Columbia for the condemnation of Crittenden Street, according to the changed location (R. 20), publication in certain newspapers being ordered, notifying all persons having any interest in the proceedings to appear, and providing for personal service upon such owners of the *land to be condemned* as might be found within the District.

That upon the testimony of an expert witness in the condemnation proceedings (R. 16), Dr. Wilkinson, the appellant, was assessed \$3,300 (R. 29), about one-eighth of the entire amount, such testimony being based largely upon a non-existent "100-foot frontage on the new street."

That Dr. Wilkinson had no actual notice of the condemnation proceedings and no knowledge of the proceedings nor of the assessment, prior to October, 1923 (R. 37), the verdict having been ratified during the preceding July (R. 25).

That, as appears from the appellant's testimony (R. 37), the position of Dr. Wilkinson's house (R. 9), and the interposition of the six-foot strip (R. 7-8), the change in the location of the street was not only *not beneficial* but was *detrimental* to the property.

ASSIGNMENTS OF ERROR

The Supreme Court of the District of Columbia erred:

1. In dismissing the bill.
2. In holding that the condemnation proceedings mentioned were authorized by law.
3. In holding that all provisions of law were complied with in said condemnation proceedings.

ARGUMENT

The Code, Section 491a, provides for the opening of streets *authorized by Congress*.

It is respectfully submitted that the extension of Crittenden Street was not so authorized.

The original highway plan was *authorized by Congress* by Act of March 2, 1893 (27 Stat. 532).

The amended plan, making no change in the location of Crittenden Street, was *authorized by Congress* by Act of June 28, 1898 (30 Stat. 519).

By the Act of March 4, 1913 (37 Stat. 949), the Commissioners were *authorized by Congress* to

prepare a *new* highway plan, to take the place of and stand for any prior plan (R. 4). The Act of 1913 further provides (R. 4), that the Commissioners are *hereby authorized* to open, extend, or widen any street, avenue, or highway *to conform with* the plan of the permanent system of highways adopted under the Act of Congress approved March 2, 1893, as amended by the Act approved June 28, 1898 (R. 4).

CONSTRUCTION OF THE ACT

It would have been easy for Congress to include the Act of 1913, if such construction had been intended, and to indicate such intention by adding the four words, "or by *this* Act." The omission of these four words brings the Act of 1913 clearly within the familiar rule that the expression of one is the exclusion of the other.

NO IMPLIED POWERS

The Act of 1913 was passed after, and was therefore obviously subject to, the decisions of this Court that the Commissioners have no *implied* powers.

Fay v. Macfarland.

32 App. D. C., 295, 299.

Newman v. Willard's Hotel Co.

47 App. D. C., 327.

The question in this case is not one of expediency but of power.

Walter v. Macfarland (1906).

27 App. D. C., 182, 185.

And in determining the power the Act of 1913,

under which the Commissioners proceeded, is to be strictly construed.

Macfarland v. Moore.

32 App. D. C. 213, 216.

But even if the desirability of such power being conferred were conceded, the rule of construction would not be varied.

Newman v. Willard's Hotel Co.

47 App. D. C., 323, 327.

ABSENCE OF BENEFIT SELF-EVIDENT

The defendants "*prove too much*" in stating in their answer (R. 17) that the plaintiff's lot "will virtually be a corner lot with the *exception* of a six-foot strip along the Crittenden Street boundary thereof." The strip affords internal evidence that the extension was not only not beneficial, but was, in fact, detrimental, and this is fatal to the appellees' case.

Johnson v. Rudolph.

54 Washington Law Reporter, 862.

Martin v. District of Columbia.

205 U. S., 135, 140.

DUE PROCESS

It was formerly the practice in condemnation proceedings in this jurisdiction to serve *a copy of an order nisi* on the owners of the land assessed.

Wight v. Davidson.

181 U. S. 371, 382.

The appellant is at a loss to know why that manifestly proper practice was allowed to fall into

disuse. If it had been followed in this case the hardship that appealed to the learned judge who presided in the Court below (R. 33), would not have been incurred. It is earnestly hoped that in the exercise of its equitable jurisdiction this Court may right a wrong that has been unwittingly perpetrated.

CONCLUSION

The appellant submits:

1. That the Commissioners, having "exhausted their mandate," had no right or power after they had amended the plan to open a street included in such amended plan, until *authorized by Congress* so to do. And that, consequently, the assessment under such unauthorized condemnation was invalid.
2. That it is manifest *on the face of the record* that the appellant's property, Lot 18, in Square 2653, was not benefited by the opening of Crittenden Street.
3. That the failure to notify the appellant, after the identity of the property affected by the proceedings had been disclosed by the verdict of the jury, that an assessment had been made against his property was a denial of due process of law, and rendered it illegal to enforce the assessment.

Wherefore, the appellant respectfully submits that the decree appealed from should be reversed.

WM. MEYER LEWIN,
Attorney for Appellants.

OCT 29 1927

Henry H. Hodges
clerk

Court of Appeals, District of Columbia.

APRIL TERM, 1927.

No. 4612

OSCAR WILKINSON, APPELLANT,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIA-
FERRO, AND WILLIAM B. LADUE, COMMISSIONERS
OF THE DISTRICT OF COLUMBIA.

APPELLEES' BRIEF.

WILLIAM W. BRIDE,
Corporation Counsel;
ROBERT L. WILLIAMS,
Assistant Corporation Counsel,
Attorneys for Appellees.

Court of Appeals, District of Columbia.

APRIL TERM, 1927.

No. 4612

OSCAR WILKINSON, APPELLANT,

vs.

PROCTOR L. DOUGHERTY, SIDNEY F. TALIAFERRO, AND WILLIAM B. LADUE, COMMISSIONERS
OF THE DISTRICT OF COLUMBIA.

APPELLEES' BRIEF.

The facts of this case seem to be sufficiently set forth in appellant's brief, and, therefore, appellees proceed at once to discuss the questions of law pertinent to the appeal.

ARGUMENT.

The assignments of error (Record, page 35) present the propositions that the court below erred in holding

that the condemnation proceedings set forth in the original bill of complaint (Record, page 7) were authorized by law and that the provisions of law were complied with in said condemnation proceedings. Counsel for appellant argues (1) the proposition that the condemnation proceeding was not authorized by law and his theory is that the Act of 1913 (37 Stats., 949) confers no power upon the Commissioners, or the District of Columbia, to proceed as they did proceed in District Court Cause No. 1550, for the condemnation of land for the extension of Crittenden Street, between Sixteenth and Seventeenth Streets, Northwest.

The appellant questions the power of the Commissioners to institute condemnation proceedings to acquire the land for Crittenden Street, as relocated, for the reason that appellant construes the Act of 1913 as giving the Commissioners the right to open, widen, or extend highways lying outside of the cities of Washington and Georgetown only in accord with such highways as they were planned under the provisions of the acts of Congress of 1893 and 1898. The Act of 1898 (27 Stats., 532) repealed all but the first five sections of the Act of 1893 (30 Stats., 519), and authorized the abandonment of all condemnation proceedings then contemplated or pending under the Act of 1893. The first section of the Act of 1893, still unrepealed and in force except as changed by legislation other than the Act of 1898, authorizes and directs the Commissioners to prepare a plan for a permanent system of highways for the territory of the District of Columbia outside of

Washington and Georgetown, and provides that the plan so made shall be as nearly in conformity with the street plan of Washington as the Commissioners may deem advisable and practicable, and provides for the widths of such planned highways. Section 2 of the act provided that the plan should be prepared in sections covering such area as the Commissioners might deem advisable and so far as practicable the Commissioners were directed to first select such areas as had already been subdivided and were not in conformity with the general plan of the city. The section further provided that no permanently paved street should be interfered with by the plan. When this plan for any such section had been adopted, the Commissioners were directed to prepare a map showing all the boundaries and areas of highways therein inclusive, and of circles or reservations, and a copy of this map was to be delivered to the commission created by the act, which commission was empowered to make such alterations in the plan as they might deem advisable, "keeping in view the intentions and provisions of this act, and the necessity of harmonizing as far as possible the public convenience with economy of expenditure." When such commission had finally approved of the plan, they were directed to deliver the same to the Commissioners for recording in the office of the surveyor, and thereafter no subdivision of land in the area affected was to be admitted to record except upon approval by the Commissioners and except the subdivision be in conformity with the plan. The section proceeds then to define the duties of the Commissioners

and agents of the United States with regard to highways abandoned within the area covered by the plan, and the duties of all persons with regard to proposed highways within the area, and provided that no proposed highway should be permitted to be laid out or established unless the land owner established to the satisfaction of the Commissioners that the proposed highway was in conformity with the plan.

Section 3 provided that the owners of land within the section so plotted might adopt the subdivision made by the plan and transfer their holdings with respect, and in reference, to the same. Sections 4 and 5 authorized the Commissioners to enter upon private land for the purpose of making the survey and to name all streets, avenues and alleys laid out or adopted under the plan.

The remainder of the act, comprising some nineteen sections, was repealed by the Act of 1898. The repealed sections provided an elaborate method for the condemnation of all lands within the affected area not owned by the United States, the District of Columbia, or which were not dedicated for public use as highways. In practice it was found that the scheme proposed by the Act of 1893 involved such an enormous expenditure and such an interminable amount of litigation as to impoverish landowners within the area affected and to constitute such a burden upon the District of Columbia as to necessitate an abandonment of the project, which was accomplished by the provisions of the Act of 1898. The reasons for the enactment of the law of June 28, 1898, are set forth in detail in a public document, being a report of the House District

of Columbia Committee on H. R. Bill No. 10209, 55th Congress, 2d Session.

This report directs attention to the fact that the 15th section of the Act of 1893 imposed the cost of the opening and improving of the highways to be established by the plan one-half upon the owners of the benefited lots, and one-half upon the District of Columbia, with no contribution from the United States; and expressed the sense of the committee to be that the revenues of the District were wholly inadequate to meet the requirements made by the act, and concluded with the two following paragraphs:

“The committee have therefore concluded that the wisest course that can be adopted at present, and one that will at the present time best subserve the interests of the municipality and the landowners and of the United States, is to repeal the Act of March 2, 1893, to annul all the proceedings thereunder, to allow the subdivisions heretofore made to remain for the present as they now are, and in respect of all unsubdivided lands outside the city limits and outside the limits of existing subdivisions to prohibit the making and recording of any new subdivisions or the laying out or improving of any new streets, unless they shall be in conformity with the plan of the city.

“In this way any increase of the evils caused by new and irregular subdivisions of unsubdivided and agricultural lands will be effectually prevented, and time and opportunity will be afforded to determine what it is necessary and possible to do in respect of the application of the plan of the city to existing subdivisions.”

The Act of 1898, Section 2, authorized the Commissioners to forthwith withdraw the map which had been made for a portion of the area covered by the provisions of the Act of 1893, and further authorized the abandonment of all condemnation proceedings brought in accord with the map, and then proceeded to authorize the Commissioners to prepare an amended plan for that portion of Section 1 lying outside of existing subdivisions, which amended plan, when recorded with the surveyor, was to take the place of any previous plan for Section 1. Section 3, provided for a submission of the readjusted plan to the Commissioners, provided for in the Act of 1893, and provided that when approved by the said Commission, or a majority thereof, the change was then to be recorded in the office of the surveyor, and become a part of the permanent highway system of the District, and take the place of any part inconsistent therewith.

It is plain that Sections 4 and 5 of the Act of 1898 have no bearing upon the questions here involved, and these sections are not discussed.

Section 6 of the act is important in view of the proceedings in this case. That section provides that the Commissioners shall not submit for approval to the Highway Commission created by the act "any map or plan thereunder until the owners of the land within the territory embraced within such map shall have been given an opportunity to be heard in regard thereto by said Commission after public notice to that effect for not less than fourteen consecutive days, excluding Sundays."

Following the enactment of the law of 1898, Congress enacted a series of laws beginning with the Act of May 31, 1900 (31 Stats., 248), and including the Acts of February 16, 1904 (33 Stats., 14), February 1, 1905 (33 Stats., 628), June 30, 1906 (34 Stats., 800), March 1, 1907 (34 Stats., 1012), and February 25, 1907 (34 Stats., 930), all of which acts had for their purpose the establishment of a permanent system of highways in the suburban areas of the District of Columbia in conformity with the Highway Plan, and provided and authorized the Commissioners to accept dedication of land falling within the plan. This intent is made manifest by the language of Section 2 of the Act of May 31, 1900, which provides that "in order to facilitate the extension of streets and encourage the donation of lands in accordance with the plans of the permanent system of highways, the Commissioners of the District of Columbia be, and they hereby are, authorized, whenever in their judgment it may seem proper, to accept the dedication of streets shown on said plans, * * *." The Act of February 1, 1905, and the subsequent acts hereinbefore noted authorized the Commissioners to prepare new highway plans for the certain areas of these suburban districts mentioned in the several acts, and in each instance provided that the new highway plan shall be prepared under the provisions contained in the act of Congress of March 2, 1893, entitled an act to provide a permanent system of highways in that portion of the District of Columbia lying outside of the cities as that act is amended by the Act of 1898, and "that upon the completion and

recording of said new highway plan, it shall take the place of and stand for any previous plan for said portion of the District of Columbia.” This latter language is used over and over again and occurs in the Act of 1913 here called into question. This lengthy reference to the acts of Congress preceding the law of 1913 is made in order that the intent of Congress in enacting that law may be understood. It will be seen at once that Congress, since 1898, has not reserved or taken unto itself the sole and exclusive privilege of defining and approving any plan of a permanent system of highways for the suburban districts of the District of Columbia, but has consistently provided that all plans for a permanent system of highways shall be proposed by the Commissioners and then approved of by the Highway Commission, and when so approved of shall be recorded and constitute a plan of such highways for the areas affected, and that all amendments of such plans shall follow a like procedure and shall, in all cases, after approval and recording in the Surveyors Office, “take the place of and stand for any previous plan for the portion of the District of Columbia affected” (Act of March 4, 1913, 37 Stats., 938-949).

The Act of 1913 authorized the Commissioners to institute condemnation proceedings for the opening, extension, and widening of highways in the suburban district of the District of Columbia to conform with the plan of the permanent system of highways in that portion of the District as the plan of such highways had been adopted under the provisions of the Act of

1893 and the Act of 1898, and provided that the condemnation proceedings should be instituted under subchapter 1, of Chapter 15, of the Code of Law of the District. The appellant contends that the provisions of this law (Act of 1913) inhibit the institution of any proceedings in condemnation, except such proceedings as are designed to carry out the highway plan as provided for by the Acts of 1893 and 1898. It is submitted that this reasoning, if followed, would be productive of a manifest absurdity for the reason that in the first place the condemnation proceedings under the Act of 1893 were abolished by the Act of 1898, and the Act of 1898 provided no method whatsoever for any condemnation proceedings and if the appellant's contention is correct, then the Commissioners of the District of Columbia and the Highway Commission would be engaged in the different and useless task of preparing intricate and expensive plans without any power whatsoever to put them in effect, and the provisions of the Act of 1913 authorizing condemnation proceedings under subchapter one of Chapter 15 of the code would be a mere nullity. Full effect can be given to the Act of 1913, and its meaning is perfectly clear if the sixth section of the Act of 1898 is examined. That section provides for a public hearing before any amended highway plan is submitted for approval to the Highway Commission and it was that section of the Act of 1898 and the first five sections of the Act of 1893 that Congress had in mind when in 1913 it provided that the Commissioners were authorized to open, widen and extend highways outside of the cities of

Washington and Georgetown to conform with the highway plan adopted under the acts of Congress approved March 2, 1893, as amended by the Act of 1898. This intention of Congress is made the more manifest when in the very first paragraph of the Act of 1913 Congress provided that "upon approval and recording of any such new highway plan it shall take the place and stand for any previous plan for the portion of the District of Columbia affected."

The Act of 1898, and the subsequent acts, *supra*, down to and including the Act of 1913, clearly express the object and purpose of the Congress to be the establishment in the outlying portions of the District of Columbia of a permanent system of highways to conform as nearly as may be with the highways of the cities of Washington and Georgetown, and to establish this system of highways with the least possible expense to the residents of the portions of municipality involved; acquiring land by dedication wherever possible, and not entering upon any great scheme of condemnation as proposed by the legislation of 1893, but absorbing the expenses gradually, and as new subdivisions were laid out, to which end Congress provided that all new subdivisions should be laid out in accordance with the plan of 1893, or the plans amendatory thereof, established by the Commissioners acting with the Highway Commission and under authority of the Act of 1898.

This interpretation of the Act of 1913 gives full force and effect to all of its provisions and is the interpretation placed upon the act by the administrative officials of the District since shortly after its passage,

and the only question very seriously heretofore raised in attacking any proceedings brought under this act was the question of compliance with Section 6 of the Act of 1898, which provided for public hearings before any amendment of the highway plan was adopted.

Coming now to the second question presented by the assignment of error, it would appear that what the appellant has in mind as constituting a failure on the part of the petitioners in the condemnation cause to comply with all provisions of law applicable, is that the appellant here had no actual notice of those condemnation proceedings and no knowledge of them, nor of the special assessment levied against his property, until October, 1923, the verdict having been ratified in July of 1923, and that this failure to give appellant actual notice of the pendency of the condemnation proceeding constitutes a non-compliance with law. In this connection, it is to be borne in mind that no property of the appellant was taken in the condemnation proceedings, his holding being entirely undisturbed. This is manifest from the allegations of the original bill, paragraph fifteen (Record, page 7).

The contention then would seem to be that benefits may not be assessed against property where none of it is condemned unless the owner thereof have actual notice of the condemnation proceeding.

It is respectfully submitted that actual notice to the owner of property specially assessed for benefits in condemnation proceedings is not necessary where, as in this case, no property of the owner is taken in the condemnation. This question has a number of times been

before the courts, and in this jurisdiction the rule is established that wherever such a situation arises, notice by publication is sufficient.

In the case of *District of Columbia vs. Lynchburg Investment Corporation*, 236 U. S., 692 *et seq.*, the court said, pages 695-6:

“The first ground of reversal was that the notice of the proceedings was insufficient, which, if true, will cast a cloud upon a great number of condemnations that have been made heretofore. The condemnation is a proceeding *in rem* under and in accordance with subchapter one, of chapter 15, of the District Code. By Section 491c of that subchapter the court is to ‘cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia,’ etc. The order in this case directs publication ‘once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, * * * commencing at least twenty days before’ January 9, 1912, the date fixed for appearance. The objection and the decision of the Court of Appeals was that the order did not follow the statute because the statute requires that notice shall be published in three daily papers for at least twenty days.

“The respondents are concerned only as parties assessed for the betterment. As such they could not be mentioned by name in the notice since by the statute the jury decides what land is benefited as well as the sum with which it shall be charged. Section 491g. It is neces-

sary, of course, that due precautions should be taken to see that they get notice in fact. This consideration together with the requirement that the publication shall be in a daily paper and its view of the meaning of the words led the Court of Appeals to the conclusion to which it came. Nevertheless we are of a different opinion. The statute means that notice shall be given either not less than twenty days before the time set or on twenty distinct days before that time. We think it means the former. As to the usage of speech, when we speak of giving a week's or a month's notice we mean a notice that is a week or a month before the event. The fact that the statute has been so construed in a great number of cases in the District, a list of which has been submitted to us, is important not only as confirmation of our view but as a reason for taking it if we felt more doubt than we do. It seems to be the prevailing rule in the state courts although there are decisions on the other side. Publication in daily papers is explained sufficiently by their being the papers that business men are most likely to read. It was said that construed as we construe it the statute would be satisfied if a single publication were made a year before the day. The answer is that the court fixes the notice and will see that no injustice is done. It should be observed further that the statute itself is notice of everything except the time and place of the proceeding. It locates exactly upon the face of the earth the extensions to be made and gives their length and width. We are of opinion that the order of publication complied with the law."

Assessments such as the one here in question have repeatedly, under similar condemnation statutes, been held to be the exercise of the power of taxation rather than the exercise of the right of eminent domain, and in matters of taxation it is generally held that the actual notice to the owner is not prerequisite. The authorities on this point are gathered in the case of *French vs. Barber Asphalt Paving Company*, 181 U. S., at 324. The court, in its opinion in this case, referred to the case of *Mattingly vs. District of Columbia* (97 U. S., 687), and quoted, at page 335, the following from the *Mattingly* case:

“In *Mattingly v. District of Columbia*, 97 U. S., 687, 692, there was called in question the validity of the act of Congress of June 19, 1878, 20 Stat., 166, c. 309, entitled ‘An act to provide for the revision and correction of assessments for special improvements in the District of Columbia and for other purposes,’ and it was said by this court, through Mr. Justice Strong: ‘It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question.’ ”

Also, at page 336 of the same opinion, the court, quoting from the case of *Kelly vs. Pittsburgh*, 104 U. S., 78, said:

“It is not asserted that, in the methods by which the value of his land was ascertained for the purpose of this taxation, there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law. The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural purposes only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest. State Railroad

Tax Cases, 92 U. S., 575; *Kennard v. Louisiana*, 92 U. S., 480; *Davidson v. New Orleans*, 96 U. S., 97; *Kirtland v. Hotchkiss*, 100 U. S., 491; *Missouri v. Lewis*, 101 U. S., 22; *National Bank v. Kimball*, 103 U. S., 732."

It is to be remembered that the answer in this case specifically sets forth in paragraph 17 thereof (Record, pp. 13-14) that the appellees did cause a copy of a certain order of notice of publication of the condemnation cause, wherein the assessment here complained of was made, to be published in two of the daily newspapers published in the District of Columbia on the 6th, 7th, 13th and 14th days of December, 1922, and that the publication was regularly made, as is evidenced by the sworn proof thereof filed as an exhibit and attached to the answer, marked "Exhibit No. 2." It is not controverted in the bill filed herein or in any testimony adduced at the hearing that this notice by publication was not given, and, therefore, it follows that the appellant in this case did have constructive notice of the pendency of the condemnation proceedings wherein the assessment complained of was made, and it is respectfully submitted that, the statutory requirements for the relocation of Crittenden Street having been in all respects complied with, and the appellant having received constructive notice of the pendency of the condemnation proceedings, he cannot be heard now to say that a special assessment made against his property, virtually as a legislative tax assessment, is invalid because he did not have actual notice of the pendency of the condemnation proceedings.

It is to be noted that the allegations of the answer to the bill (Record, p. 12) set up the publication of notice of the public hearing of the proposed change in the highway plans, and set up that such a hearing was had. The giving of this particular public notice, and the holding of the hearing therein noticed, not being controverted by the plaintiff below, it is difficult to see how he can now be heard to raise any other question than the one he made at the hearing of this cause, that is, lack of actual notice of the proceeding. That question is treated *supra*, and the authorities submitted would seem to be conclusive thereof.

Conclusion.

Statutes granting a power in derogation of common-law right should be strictly construed to ascertain the grant of power; but, that grant having been found to exist, the statutes should then be construed reasonably in order to carry into effect the power. This doctrine is announced by this Court in the case of *Washington Railway and Electric Co. vs. Newman*, 41 Appeals D. C., 439, which was an action in condemnation for the extension of the line of Q Street, in the city of Washington, under the provisions of the Act of March 2, 1911 (36 Stats., 966, 978). Said the Court, page 444:

“It will be observed that the statute did not fix with absolute certainty and precision the location of the bridge. This was deferred to conform to the final location of the street. It is true, as contended by defendant, that the com-

missioners might use the laid-out portion of Q Street extending from Twenty-third Street west to the creek bank, construct the bridge across the creek at that point, and then proceed in a southwesterly direction to the eastern terminus of the street west of the creek. But the commissioners, in their discretion, chose another line for connecting the two points, and, in doing so, we think exercised a power clearly conferred by the statute. The statute in this particular should be reasonably construed in order to carry into effect the power of location thus broadly conferred upon the commissioners. 'In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it.' Lewis, *Em. Dom.*, 3rd Ed., Sec. 390."

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